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August 29, 2001

The Honorable Donald L. Evans
Secretary of Commerce
Attention: Import Administration
Central Records Unit, Room 1870
U.S. Department of Commerce
14th Street and Constitution Avenue, N.W.
Washington, D.C. 20230

Re: Silicomanganese from Kazakhstan; Response to Kazchrome August 14
Letter Concerning Market-Economy Claims

Dear Mr. Secretary:

On behalf of Petitioners, we file this letter in response to the August 14, 2001 letter filed by Transnational Company Kazchrome and Aksu Ferroalloy Plant ("Kazchrome") responding to our July 30, 2001 letter regarding Kazchrome's and the Government of Kazakhstan's ("GOK") market-economy claims.¹

I. In Numerous Fundamental Respects Kazakhstan Is Not Comparable To The Czech Republic, Slovakia or Latvia

In its August 14 letter, Kazchrome relies heavily on the Department of Commerce ("Department") determinations awarding market-economy status to the Czech Republic, Latvia and Slovakia and attempts to portray Kazakhstan as a country that is comparable, or even more advanced, than those countries in terms of economic reform.² This argument is patently wrong. In numerous specific respects detailed below, Kazakhstan is not comparable to the Czech Republic, Latvia or Slovakia at the time the Department granted market-economy status to those

¹ Letter from O'Melveny & Myers LLP, Counsel for Kazchrome, to the Honorable Donald L. Evans, Secretary of Commerce (August 14, 2001) ("Kazchrome August 14 Letter").

² See *id.* at 2-5, 9 and 13-14.

countries. And as discussed below and explained in detail in the attached Freedom House report, *Nations in Transit 2001*,³ when the Soviet Union collapsed, these countries (along with other formerly communist countries in Central and Eastern Europe (“CEE”) and the Baltics), were already well on their way toward political and economic reform. They had a prior institutional history of markets and democratic practices, which was only rather briefly (from a historical perspective) interrupted by a period of Marxist/Leninist socialism due to Soviet conquest. Notwithstanding some remaining problems, it was reasonably apparent that the Czech Republic, the Slovak Republic and Latvia already had or would very soon join the market-based democracies of Europe, given their embrace of democracy and rapid economic reform.

The unfortunate fact is that the countries of the former Soviet Union (outside of the Baltics) have taken a very different path. It has become increasingly clear that regressive and parasitic authoritarian and despotic states are in power and that the “market” reforms undertaken are at best partial and are undermined by the lack of democracy, rule of law, transparency and accountability in these countries. This is certainly true in Kazakhstan. Despite a veneer of democracy, the current government of Kazakhstan essentially is a presidential dictatorship.⁴ And despite elements of economic reform, the state directly owns and controls a major portion of the economy, including key sectors; the state controls the prices of a very large number of enterprises and holds prices artificially below cost-recovery levels (based on political considerations and at the directive of senior government officials, according to the regulators themselves⁵); and the

³ *Nations in Transit 2001* is the “only comprehensive, comparative, multidimensional study of its kind.” Adrian Karatnycky, *Nations in Transit: Emerging Dynamics of Change*, in *NATIONS IN TRANSIT 2001* 13 (Freedom House 2001), attached as Exhibit 1 (the Kazakhstan country report and all parts other than the individual reports for other countries). It “offers a series of signposts that facilitate comparisons of the direction and state of political and economic transition among the states of Central and Eastern Europe (CEE) and the former Soviet Union (USSR).” *Id.* The *Nations in Transit* survey is part of a public-private initiative that is funded primarily by the U.S. Agency for International Development. *Id.* The full report including individual reports for other countries is available at the Freedom House website at www.freedomhouse.org. Kazchrome relied on an older edition of the *Nations In Transit* report in making its market-economy claim. See Letter from O’Melveny & Myers LLP, Counsel for Kazchrome, to the Honorable Donald L. Evans, Secretary of Commerce (June 28, 2001) (“Kazchrome June 28 Letter”) at 7, 10, 14, 15, 16, 17, 20 and Exhibit 8; see also Kazchrome August 14 Letter, *supra* note 1, at 3 (referring to the reports attached to Kazchrome’s June 28 submission, which include the older Freedom House report), 9, 15 and 17.

⁴ See Letter from Verner, Liipfert, Bernhard, McPherson and Hand, Chartered, Counsel for Petitioners, to the Honorable Donald L. Evans, Secretary of Commerce, at 24-27 (July 30, 2001) (“Petitioners’ July 30 Letter”).

⁵ See *Kazakhstan: Joint Private Sector Assessment*, Executive Summary, The World Bank DC-461710.1

state is deeply entangled in economic activity in Kazakhstan through many other means, as explained in Petitioners' July 30 letter and below.⁶ Furthermore, Kazakhstan is not a place where the state sits as a neutral regulator over independent "private" economic actors competing in the marketplace. As noted in Petitioners' July 30 letter⁷ and discussed more fully below based on new information in *Nations in Transit 2001*, the cast of economic and political actors in Kazakhstan is largely one and the same. To the extent that "private" economic actors exist, their success depends on the support and patronage of the state.⁸

As *Nations in Transit 2001* states, based on its comprehensive survey of transition economies,

the survey rates eight CEE states as consolidated market economies. Not a single non-Baltic post-Soviet state has made it into this category. And, indeed, only Armenia and Moldova appear to have economic ratings that would place them in the upper half of the transitional economy category. Thus, it can be said that of the 12 non-Baltic post-Soviet countries {(including Kazakhstan)}, *none are poised to join the ranks of the dynamic entrepreneurial market economies or of the consolidated democracies in the near future.*⁹

In fact, *Nations in Transit 2001* classifies Kazakhstan as a "Least Advanced (Despotic State)" and gives it very low cumulative scores for economic and political reform, below those of Russia and Ukraine, and far below the scores for the Czech Republic, Latvia and Slovakia at the time the Department granted market-economy status to those countries.¹⁰

Group, at 7, attached as Exhibit 2. Kazchrome cited this World Bank document in its June 28 and August 14 letters, but did not provide the full text of the document for the record. See Kazchrome June 28 Letter, *supra* note 3, at 11, 12 and 17; Kazchrome August 14 Letter, *supra* note 1, at 17, note 74. Rather, Kazchrome only provided the website address for the document. *Id.*

⁶ See Petitioners' July 30 Letter, *supra* note 4, at 27.

⁷ See *id.* at 5-6.

⁸ See, e.g., Karatnycky, *supra* note 3, at 21-22.

⁹ *Id.* at 16.

¹⁰ Alexander J. Motyl, *Ten Years after the Soviet Collapse: Persistence of the Past and Prospects for the Future*, in *NATIONS IN TRANSIT 2001* 37-38 (Freedom House 2001), attached as Exhibit 1.

Kazakhstan also has poor and worsening scores for democratization, rule of law and economic liberalization over the 1997-2001 period.¹¹

Summarizing the differing outcomes in economic and political reform in the former communist states, Freedom House states that

{f}or most of the 1990s, the post-Communist states fell into three geographically clustered groupings of distinct regime types: market-oriented democracies in east-central Europe, despotisms, for the most part, in Central Asia, and parasitic authoritarian states in between.¹²

Freedom House includes the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland and Slovenia in the group of “market-oriented democracies”; Albania, Armenia, Bulgaria, Croatia, Georgia, Kyrgyz Republic, Macedonia, Moldova, Romania, Russia, Slovakia¹³ and Ukraine in the second group; and Azerbaijan, Belarus, Kazakhstan, Tajikistan, Turkmenistan, Uzbekistan and Yugoslavia in the least advanced group of despotic states.¹⁴ Freedom House states:

The most advanced category consists of countries that, by virtually any measure, most closely resemble functioning democracies,

¹¹ See *Kazakhstan Country Report*, in *NATIONS IN TRANSIT 2001* 208 (Freedom House 2001), attached as Exhibit 1. The European Union (“EU”) has a procedure in its antidumping regime that is analogous to the Department’s market-oriented industry test. See *EU Extends Antidumping Ad Hoc Market Economy Regime to Seven Countries*, Press Release, Commission of the European Communities (October 11, 2000), attached as Exhibit 5. In October 2000, the EU included Kazakhstan in the list of NME countries eligible to make such “market-oriented” industry claims in EU antidumping cases. *Id.* Contrary to a statement in the *Nations In Transit 2001* country report for Kazakhstan, the EU does not treat Kazakhstan as a market economy country under its antidumping law.

¹² Motyl, *supra* note 10, at 36, attached as Exhibit 1.

¹³ Slovakia was ranked very high in the second group at the time the Department granted it market-economy status. See *id.* at 36-37. Freedom House now ranks Slovakia as having a consolidated market democracy (See Table B: Nations in Transit 2001 Political and Economic Classifications, in *NATIONS IN TRANSIT 2001* 26 (Freedom House 2001), attached as Exhibit 1), and, as explained below, gives it far higher scores for democratization, rule of law and economic liberalization than Kazakhstan during the relevant period.

¹⁴ See *id.* at 36.

market economies, rule of law states, and civil societies. The least advanced category of despotic states {including Kazakhstan} comprises the least approximate democracies, market economies, rule of law states, and civil societies. The middle category of parasitic authoritarian states possesses some of these institutions to some degree.¹⁵

....

The most and least advanced states were, at the end of the 1990s, stable. That is to say, they were internally coherent systems capable of reproducing themselves and the conditions of their rule. The market-oriented democracies of East-central Europe enjoyed relatively high popular legitimacy and, no less important, were capable of delivering the goods. The despotisms of Central Asia, the Caucasus, and Belarus ruled by means of patronage, popular demobilization, and repression.¹⁶

¹⁵ *Id.* at 37.

¹⁶ *Id.* at 40. In *Nations In Transit 2001*, Freedom House asks: “What accounts for the widely differing trajectories taken by the CEE countries and the 12 non-Baltic states of the former Soviet Union?” Karatnycky, *supra* note 3, at 17, attached as Exhibit 1. It states:

There are, of course, numerous reasons, but four particular differences are central to the disparate outcomes: (1) dissimilarities in historical legacies and paths to post-Communism, (2) the emergence of significantly different state systems, (3) substantial variations in the patterns of corruption and cronyism, and (4) considerable disparities in the development of civil society, political parties, and independent media.

Id. Among other things, the “CEE countries had shorter periods under Marxist-Leninist socialism than the countries that emerged from the collapse of the unitary USSR.” *Id.* Thus, a “historical memory of market systems and private property relations was also part of the legacy of many CEE countries.” *Id.* A related factor was “the manner in which communism collapsed. In the Baltic states and in Central and Eastern Europe the collapse was in large measure the product of collective, nonviolent civic action that helped topple unpopular regimes.” *Id.* By contrast, “in most of the USSR (the exceptions being the Baltic states and the Caucasus) the country’s collapse was as much, if not more, the consequence of elite decisions as of civic action.” *Id.*

For the Department's convenience, we have reproduced below pertinent parts of the Freedom House table showing the cumulative scores over the 1997-2001 period for political and economic reform in Kazakhstan, the three countries to which the Department recently granted market-economy status (the Czech Republic, Latvia and Slovakia) and two NME countries to which the Department declined to grant market-economy status (Russia and Ukraine). Freedom House scores transition economies on a scale of 1 to 7 (with 1 being the best score) in nine political and economic subcategories which are grouped into three broad areas: democratization, rule of law and economic liberalization. The figures in the table below represent the sum of the individual scores for all nine subcategories (except the corruption subcategory due data unavailability for 1997 and 1998).

	1997	1998	2000	2001
MOST ADVANCED (DEMOCRATIC MARKET-ORIENTED STATES)				
Czech Rep.	13	14	15	16
Latvia	18	18	18	17
MIDDLE: MOVING UPWARDS				
Slovakia	29	29	22	21
MIDDLE: MOVING DOWNWARDS				
Ukraine	33	36	36	35
Russia	30	32	34	36
LEAST ADVANCED (DESPOTIC STATES)				
Kazakhstan	40	40	41	42

As the table shows, Kazakhstan is not remotely in the same category as the three countries to which the Department recently granted market-economy status. In addition, Kazakhstan's scores have worsened over the 1997-2001 period.

The same is true when looking at the scores for democratization, rule of law and economic liberalization. For Kazakhstan, the scores are as follows:

NATIONS IN TRANSIT SCORE				
	1997	1998	1999-2000	2001
Democratization	5.30	↓ 5.35	↓ 5.38	↓ 5.56
Rule of Law	na	na	5.75	↓ 6.00
Economic Liberalization	4.38	↓ 4.50	4.50	4.50

For the Czech Republic, the scores are far better:¹⁷ 1.81 for democratization, 3.13 for rule of law and 2.00 for economic liberalization.¹⁸ The same is true for Latvia, with scores of 1.94 for democratization, 2.75 for rule of law and 2.5 for economic liberalization.¹⁹ Slovakia has slightly less favorable scores (2.25 for democratization, 3.00 for rule of law and 3.25 for economic

¹⁷ The 2001 scores and ratings reflect the period July 1, 1999-October 31, 2001. Since the 2001 ratings are the most current data available for Kazakhstan and the Department granted market-economy status to the Czech Republic, Latvia and Slovakia during the July 1, 1999-October 31, 2001 period, we have used the 2001 ratings for comparison purposes. *Nations in Transit 2001* states that it “does not rate governments per se, nor does it rate countries based on governmental intentions or legislation alone. Rather, a country’s ratings are determined by considering the practical effect of the state and nongovernmental actors (business oligarchies, social movements, insurgencies, and other groups that function outside of the normal political and civic process). . . .” Kazchrome submitted EBRD scores regarding the level of economic reform in certain categories in transition countries. See Letter from O’Melveny & Myers LLP, Counsel for Kazchrome, to the Honorable Donald L. Evans, Secretary of Commerce, Exhibit 12 at 1 (June 28, 2001) (“Kazchrome Submission”). Overall, Kazakhstan is ranked lower than the Czech Republic, Latvia and Slovakia by the EBRD. The EBRD ranked Kazakhstan below the Czech Republic, Latvia and Slovakia in the categories of governance and enterprise restructuring, small-scale privatization, trade and foreign exchange system, competition policy, and banking reform and interest rate liberalization. *Id.* The EBRD also ranked Kazakhstan below the Czech Republic and Slovakia for large-scale privatization. *Id.* Latvia was ranked at the same level as Kazakhstan in this category, but as explained below, the level of large-scale privatization is much more important in Kazakhstan than in Latvia (or the Czech Republic and Slovakia) because large enterprise is dominant in Kazakhstan, but not in these other countries. The EBRD ranked Kazakhstan lower than the Czech Republic, and at the same level as Latvia and Slovakia, for securities markets and non-bank financial institutions. (Securities markets and non-bank institutions are not very well developed in Kazakhstan, and Kazchrome has made no claim that they are an important factor.) The EBRD ranked all four countries the same for price liberalization, but as discussed below, the Department has recognized that price liberalization does not mean that functioning markets are in place in a country. Furthermore, the record as a whole demonstrates that while the type of reforms underlying Kazakhstan’s EBRD scores (such as improvements in commercial law) may lay the groundwork for the emergence of a market-based economic system in the future, they do not establish that functioning markets were in place during the POI.

¹⁸ See *Czech Republic Country Report*, in *NATIONS IN TRANSIT 2001* 160 (Freedom House 2001), attached as Exhibit 1.

¹⁹ See *Latvia Country Report*, in *NATIONS IN TRANSIT 2001* 234 (Freedom House 2001), attached as Exhibit 1.

liberalization), but they are still far better than Kazakhstan's, and Slovakia has been on an upward path in terms of political and economic reform. By contrast, Kazakhstan's scores for democratization, rule of law and economic liberalization have worsened over 1997-2001.

An August 2000 EBRD paper reaches largely the same conclusion regarding the disparity in the level of economic reform in the former communist states of central Europe as compared to the countries of the Commonwealth of Independent States ("CIS") (including Kazakhstan, Russia and Ukraine). Examining a variety of factors that characterize centrally planned economies (e.g., higher levels of employment in industry, lack of a financial system to allocate savings to investment, and inefficient use of energy), the EBRD paper finds that the group of countries that have more central planning characteristics include ten countries in the CIS and southeastern Europe ("SEE") (including Kazakhstan). The report concludes that the "financial and institutional framework for a market economy clearly is much weaker than one would expect" in the CIS and SEE countries. The paper states that in the advanced former communist countries in central Europe, "the transition is closer to completion" and "10 years were enough to upgrade the economic software, even if the hardware is still recognizably from a different era." The paper concludes:

The countries in the CIS (and some from the SEEs) *clearly are in a different category. They still have problems with the transition toward credible market based institutions and financial systems. Will they need another decade to catch up?*²⁰

Furthermore, the level of state ownership and control of the means of production is significantly higher in Kazakhstan than in the Czech Republic, Latvia and Slovakia. Kazchrome argues in its August 17 letter that the percentage of GDP accounted for by the state in Kazakhstan is "smaller" than was the case for Latvia and Slovakia.²¹ That is not true. Nor is it true with respect to the Czech Republic. The evidence on the record indicates that 40 percent of GDP in Kazakhstan in 1999 and 2000 was produced by the state sector.²² In granting market-

²⁰ Daniel Gros & Marc Suhrcke, *Ten Years After: What Is Special About Transition Economies*, Working Paper No. 56 at 17, European Bank for Reconstruction and Development (August 2000) (emphasis added), attached as Exhibit 3.

²¹ See Kazchrome August 14 Letter, *supra* note 1, at 13-14.

²² Both Kazchrome and the GOK argued that the private sector share of GDP is (or is as high as) 75 percent (i.e., a state share of 25 percent). See Kazchrome June 28 Letter, *supra* note 3, at 11; Kazchrome August 14 Letter, *supra* note 1, at 11 and 13; Letter from the Government of the Republic of Kazakhstan to the Honorable Donald L. Evans, Secretary of Commerce (July 9, 2001) at 7 and Exhibit 7 (providing GOK estimates) ("GOK Submission"). Contrary to these claims, the *Nations in Transit 2001* report states that the "size of {the} private sector as % of

economy status to the Czech Republic and Slovakia, the Department noted that the state portion of GDP in those countries was 25 percent.²³ The state share in Latvia was 35 percent. However, the Department found the Latvian figure “somewhat misleading” in part because in key elements

GDP (mid-2000)” was 60 percent. *Kazakhstan Country Report*, *supra* note 11, at 208 (citing EBRD data), attached as Exhibit 1. In fact, a January 16, 2001 World Bank report contained in Kazchrome’s original market-economy submission also states that “{t}he private sector accounts for 60 percent of GDP, a share that {is} about average for the region, but considerably smaller than that in the Baltics or Central Europe.” *Memorandum of the President of the International Bank for Reconstruction and Development (“IBRD”) and the International Finance Corporation to the Executive Directors on a Country Assistance Strategy for the Republic of Kazakhstan (“Memo of the President of the IBRD”)*, The World Bank, at 14 (January 16, 2001) (attached as Ex. 2 to Kazchrome Submission), citing *Economic Transition in Central and Eastern Europe, Baltic States and the CIS*, Transition Report 2000: Employment, Skills and Transition, European Bank for Reconstruction and Development at 14 (Table 2.1) (2000) (attached as Ex. 12 to Kazchrome Submission). The EBRD report in Kazchrome’s submission also cites the 60 percent figure. *See id.* (providing the “private sector share of GDP in % mid-2000 (EBRD estimate)”) (any such GDP figures are estimates). That is the same percentage as in 1999, contradicting Kazchrome’s unsupported assertion in its letter that the state share of GDP in Kazakhstan “continues to decline.” Kazchrome August 14 Letter, *supra* note 1, at 14. In addition, the GOK estimates may include the output of companies in which only a minority stake has been privatized. *See Economic Transition in Central and Eastern Europe, Baltic States and the CIS*, at 14 (attached as Ex. 12 to Kazchrome Submission) (noting that “{t}he EBRD estimates may in some cases differ markedly from available data from other sources on the contribution to GDP made by the ‘private sector’ or by the ‘non-state sector.’ This is because the definition of the EBRD concept differs from that of the official estimates. Specifically, for the CIS countries, official data in most cases refer to value added in the ‘non-state sector’ – a broad concept which incorporates collective farms as well as companies in which only a minority stake has been privatized.”).

²³ *See* Dep’t of Commerce Memorandum from John Brinkman, Program Manager, Norbert Gannon, Senior Analyst, and Dennis McClure, Financial Analyst, to Robert S. LaRussa, Assistant Secretary at 10 (November 29, 1999) (“Czech NME Memo”) (noting that at the end of 1997, “the private sector accounted for 75 percent of GDP”); *See* Dep’t of Commerce Memorandum from Bernard Carreau, Deputy Assistant Secretary, to Robert S. LaRussa, Assistant Secretary at 10 (October 13, 1999) (“Slovakia NME Memo”) (“{a}t the end of 1997 . . . the private sector accounted for 75 percent of GDP.”). In its letter, Kazchrome states that “{w}hen graduating Slovakia, the Department observed that ‘the share of assets privatized at the end of 1997 exceeded 60 percent.’” *Id.* (emphasis in original). That is not a percentage of GDP figure. The relevant percentage of GDP figure is contained in the Department’s Slovakia memorandum (on the same page as cited by Kazchrome).

of the Latvian economy, including manufacturing, the private sector portion of output was 90 percent or higher (*i.e.*, the state share was under 10 percent).²⁴ Specifically, the private sector in Latvia accounted for over 95 percent of output in mining, manufacturing, construction and wholesale and retail trade and over 90 percent of output in agriculture and fishing.²⁵ That is not the case in Kazakhstan, where the more than 300 wholly state-owned enterprises alone account for about a third of GDP (without counting the output of the 6,000 majority state-owned enterprises).²⁶

²⁴ See Dep't of Commerce Memorandum from Christopher Smith, Case Analysts and Keir Whitson, Case Analyst, to Troy Cribb at 12 (January 10, 2001) ("Latvia NME Memo").

²⁵ See *id.*

²⁶ See Petitioners' July 30 Letter, *supra* note 4, at 4-5, citing *Kazakhstan Investment Profile*, European Bank for Reconstruction ("EBRD"), at 11 (attached as Ex. 4 to GOK Submission). In its letter, Kazchrome asserts that "Petitioners overstate the number of remaining state-owned enterprises" Kazchrome August 14 Letter, *supra* note 1, at 13. Specifically, Kazchrome argues that "{t}he IBRD report, quoted by Petitioners, states that "{t}he privatization of small- and medium-scale enterprises is nearly complete, but about 100 large and 260 medium enterprises remain under public ownership." *Id.* First, the figures cited by Petitioners in their July 30 letter (over 300 wholly state-owned enterprises and 6,000 majority state-owned) are not in the IBRD report submitted by Kazchrome (Exhibit 2 of its submission), but rather, are in an April 2001 EBRD report (Exhibit 4 of its submission). See Petitioners' July 30 Letter, *supra* note 4, at 4, note 6. Second, the statements regarding the number of state-owned enterprises in the reports submitted by Kazchrome appear somewhat inconsistent, apparently due to differing ideas about what is a "large" or "medium" enterprise and what constitutes "public" ownership (*i.e.*, whole state ownership versus majority state ownership). In fact, it is not clear from the IBRD statement relied upon by Kazchrome that the IBRD is speaking about all enterprises in which the GOK has majority or greater ownership (*i.e.*, its reference to 360 companies under "public ownership" may mean just the *wholly-owned* GOK enterprises). Indeed, the number of such enterprises under "public ownership" identified by the IBRD (360) is consistent with the number of such enterprises reported in the April 2001 EBRD report relied upon by Petitioners (stating that there are more than 300 such wholly state-owned companies, in addition to the 6,000 large and medium-sized enterprises that are majority state-owned). Petitioners evaluated all of the reports submitted by Kazchrome and believe that the best information on the record regarding the number of enterprises *either wholly-owned by the state or majority-state-owned* is the April 2001 EBRD report. That report states that it "prepared with information available up to March 2001, derived principally from the EBRD, the World Bank, Reuters, BISNIS, and Kazakh government agencies." *Kazakhstan Investment Profile*, at 11 (attached as Ex. 4 to GOK Submission).

In addition, in granting market-economy status to Slovakia, the Department noted that its “large scale privatization program was nearly complete.”²⁷ With respect to the Czech Republic, the Department noted that “virtually all” manufacturing enterprises (as well as agricultural and service enterprises) were in “private hands.”²⁸ As noted above, for Latvia, practically all enterprises in manufacturing, mining and construction had been privatized (such that state output in these sectors was under 10 percent). Again, that is not the case in Kazakhstan, where the state wholly owns more than 300 companies that account for a third of GDP and is the majority owner of another 1,000 large enterprises and 5,000 medium-sized enterprises.²⁹

In addition, in granting market-economy status to the Czech Republic, Latvia and Slovakia, the Department noted that workers were moving out of large or heavy enterprise (where some state companies remained) and into flourishing small and medium-sized enterprises (“SME”) in the private service, retail and light industry sectors. For the Czech Republic, the Department noted that the number of small and medium-sized firms had increased, while the number of large firms decreased.³⁰ The Department also found that “{w}orkers are moving out of agriculture and industry and into the market services sector Consequently, the share of the market services sector in GDP at the end of 1997 was approximately 55 percent and growing.”³¹ The Department noted that “Czech enterprises as a whole have reoriented themselves, diversifying away from large-scale heavy industrial production into smaller-scale, higher value-added manufacturing and services.”³² The Department observed similar facts in the case of Slovakia.³³ For Latvia, the Department found that “{s}ervices now account for nearly 70

²⁷ Slovakia NME Memo, *supra* note 23, at 10.

²⁸ Czech NME Memo, *supra* note 23, at 13.

²⁹ See Petitioners’ July 30 Letter, *supra* note 4, at 4, citing *Kazakhstan Investment Profile*, *supra* note 25, at 11 (attached as Ex. 4 to GOK Submission); Freedom House, *NATIONS IN TRANSIT 1999-2000* at 234 (attached as Ex. 8 to Kazchrome Submission); *Kazakhstan: Joint Private Sector Assessment*, *supra* note 5, at 4, attached as Exhibit 2. In addition, as noted in Petitioners’ July 30 letter, a World Bank report submitted by Kazchrome states that “while most targeted small firms have been privatized, *large scale privatization is still lagging behind.*” *Kazakhstan Public Expenditure Review*, The World Bank, Report No. 20489-KZ, Vol. I at xiii (June 27, 2000) (attached as Ex. 1 to Kazchrome Submission) (emphasis added).

³⁰ See Czech NME Memo, *supra* note 23, at 13.

³¹ *Id.*

³² *Id.* at 17.

³³ See Slovakia NME Memo, *supra* note 23, at 12 and 15.

percent of the economy, and industrial production has shifted toward products like wood, food processing, and textiles”³⁴ The Department also noted the large and growing number of SMEs in the industrial sector in Latvia.³⁵

Kazakhstan is a completely different story. The major sectors of the economy are oil and gas production (50 percent of GDP alone and ultimately controlled by the Nazarbayev regime³⁶), mining (25 percent of GDP and also controlled by the regime through means including nontransparent and non-open licensing procedures³⁷), metals production (one quarter of industrial output) and other heavy manufacturing.³⁸ As pointed out in Petitioners’ July 30 letter, a World Bank document states that the GOK is the most important shareholder among large oil and gas sector firms and maintains considerable control in the industrial sector.³⁹ In addition, unlike in the Czech Republic, Latvia and Slovakia, large enterprises overwhelmingly predominate in Kazakhstan. As explained above, over 300 large and very large enterprises that account for a third of GDP are wholly owned by the state, while many more large enterprises -- 1,000 -- are majority state-owned.⁴⁰ In addition, the state has large minority holdings in many other large

³⁴ Latvia NME Memo, *supra* note 24, at 5.

³⁵ *See id.* at 18.

³⁶ *See* Petitioners’ July 30 Letter, *supra* note 4, at 27, citing *Kazakh Prime Minister Resigns, Named to Head KazakhOil*, Interfax News Agency (October 1, 1999) (attached as Ex. 22 to Letter from Verner, Liipfert, Bernhard, McPherson & Hand, Chartered, Counsel for Petitioners, to the Honorable Donald L. Evans, Secretary of Commerce (August 23, 2001) (“Petitioners’ August 23 Letter”)) and *Kazakhstan Country Report*, The Economist Intelligence Unit, at 13 (July 2001) (attached as Ex. 28 to Petitioners’ August 23 Letter).

³⁷ *See id.* at 6-7; *See also* Letter from Verner, Liipfert, Bernhard, McPherson and Hand, Chartered, Counsel for Petitioners, to the Honorable Donald L. Evans, Secretary of Commerce at 6 (August 14, 2001) (“Petitioners’ August 14 Letter”).

³⁸ *See Economic Transition in Central and Eastern Europe, Baltic States and the CIS*, *supra* note 22, at 13-20 (attached as Ex. 12 to Kazchrome Submission).

³⁹ *Memo of the President of the IBRD*, *supra* note 22, at 14 (attached as Ex. 2 to Kazchrome Submission). In addition, as described below, the economic elites in Kazakhstan that have acquired ownership shares in many privatized industrial enterprises are directly connected to the Nazarbayev regime.

⁴⁰ *See* Petitioners’ July 30 Letter, *supra* note 4, at 4, citing *Kazakhstan Investment Profile*, *supra* note 25 at 11 (attached as Ex. 4 to GOK Submission).

industrial enterprises such as Kazchrome.⁴¹ The World Bank notes (in a document that Kazchrome cited but did not provide for the record) that the “{t}he official data suggests that SMEs are much less important in Kazakhstan (accounting for about eight percent of GDP) than in many developed countries or even in other transition economies.”⁴²

There are other important differences between Kazakhstan and the Czech Republic, Latvia and Slovakia. In the Czech Republic and Slovakia, the remaining limited price controls covering utilities, energy and rents were being phased out (and prices for these items very significantly increased).⁴³ The Department also noted the “repeated increases” in regulated prices for such commodities in Latvia.⁴⁴ By contrast, in Kazakhstan, a huge number of enterprises (1,100) are treated as “natural monopolies,” there are numerous reports of regulators refusing to raise rates,⁴⁵ regulators have admitted that the prices set are often influenced by political forces and by senior GOK officials,⁴⁶ and there is no evidence of any phaseout, reduction or even moderation in such price regulation during the POI.

In addition, in 1995, four years before the Department awarded market-economy status to the Czech Republic, all but 10 percent of the land had been transferred to private owners and the government had plans to sell half of its remaining holdings.⁴⁷ In Slovakia, the transfer of land into private hands also was essentially complete at the time it received market-economy status.⁴⁸ In Latvia, private land ownership was not as far along, but a significant portion of the

⁴¹ See *id.* at 4, note 7; see also Petitioners’ August 14 Letter, *supra* note 37, at 8.

⁴² *Kazakhstan: Joint Private Sector Assessment*, *supra* note 5, at 3, attached as Exhibit 2 (emphasis added).

⁴³ See Czech NME Memo, *supra* note 23, at 4 and 12; Slovakia NME Memo, *supra* note 23, at 11.

⁴⁴ Latvia NME Memo, *supra* note 24, at 15.

⁴⁵ See Petitioners’ July 30 Letter, *supra* note 4, at 11, citing *Kazakhstan Investment Profile*, *supra* note 26, at 21 (attached as Ex. 4 to GOK Submission).

⁴⁶ See *Kazakhstan: Joint Private Sector Assessment*, *supra* note 5, at 7, attached as Exhibit 2. The World Bank stated that “{p}rivatization of these natural monopoly sectors requires that a professional and independent regulatory commission be in place.” *Id.*

⁴⁷ See Czech NME Memo, *supra* note 23, at 12.

⁴⁸ See Slovakia NME Memo, *supra* note 23, at 11.

land had been transferred to private hands and virtually all nonforested land was in private use.⁴⁹ In Kazakhstan, private ownership of agricultural land was only legalized at the end of last year and it is unclear whether and to what degree land actually has been transferred to private hands.⁵⁰

Finally, at the time the Department awarded the Czech Republic market-economy status, it was a member of the World Trade Organization (“WTO”) and the Organization for Economic Co-operation and Development (“OECD”), which the Department noted “required a demonstrated commitment to an open market economy, democratic pluralism and respect for human rights.”⁵¹ Slovakia was also a WTO member and was “close to membership in the EU and the OECD.” Latvia was a WTO member and was making ongoing efforts to join the EU.⁵² Kazakhstan is not a WTO or OECD member and its “WTO accession process is lagging.”⁵³

II. The Nature Of The GOK And Political Power In Kazakhstan Are Highly Relevant

In its August 14 Letter, Kazchrome asserts that

{i}t is difficult to ascertain what, if any, information in Section IV of Petitioners’ {July 30 letter (concerning in large part the nature of political power in Kazakhstan)} has any relevance to the Department’s determination regarding whether Kazakhstan has achieved the extent of reforms necessary such that it operates on “market principles of cost or pricing structures.”⁵⁴

First of all, the Department itself has recognized the relevance of democratic reform in creating the political freedoms that underlie market-based systems.⁵⁵

⁴⁹ See Latvia NME Memo, *supra* note 24, at 14.

⁵⁰ See *Kazakhstan Country Report*, *supra* note 11, at 218, attached as Exhibit 1.

⁵¹ Czech NME Memo, *supra* note 23, at 15.

⁵² See Latvia NME Memo, *supra* note 24, at 19.

⁵³ *Republic of Kazakhstan*, International Monetary Fund Staff Report for the 2000 Article IV Consultation, at 14-15 (November 17, 2000) (attached as Ex. 6 to Kazchrome Submission).

⁵⁴ Kazchrome August 14 Letter, *supra* note 1, at 19, note 85.

⁵⁵ See Czech NME Memo, *supra* note 23, at 15.

Furthermore, when (as in Kazakhstan): (1) the state wholly owns more than 300 very large enterprises that account for a third of GDP;⁵⁶ (2) the state is the majority owner of another 1,000 large enterprises and 5,000 medium-sized enterprises;⁵⁷ (3) the state-owned enterprises “dominate the economy” (according to the World Bank);⁵⁸ (4) the state is a minority owner of another 2,000 enterprises and the state uses its shares and board position to block decisions;⁵⁹ and (5) the state regulates the prices of over 1,100 enterprises as “natural monopolies”⁶⁰ (in which the prices set are often influenced by political forces and by senior GOK officials, according to the state regulators themselves),⁶¹ it clearly matters whether the state is a neutral and democratic body (with checks and balances and a division of power) or instead is a highly personalized presidential dictatorship deeply involved in exercising control over the economy and key production assets.⁶²

Economic and political power in Kazakhstan are highly concentrated in the hands of president Nursultan Nazarbayev, his family and his political associates.⁶³ As noted in Petitioners’ July 30 letter, key decisions are made by an elite group surrounding the president, with parliamentary parties “acting as little more than government-sponsored pressure groups.”⁶⁴ As explained by Freedom House, in countries of the former Soviet Union outside of the Baltics,

⁵⁶ See *Kazakhstan: Joint Private Sector Assessment*, *supra* note 5, at 4, attached as Exhibit 2; see also *Kazakhstan Investment Profile*, *supra* note 26, at 11 (attached as Ex. 4 to GOK Submission).

⁵⁷ See *id.*

⁵⁸ See *Kazakhstan: Joint Private Sector Assessment*, *supra* note 5, at 4, attached as Exhibit 2.

⁵⁹ See *id.* at 4-5, attached as Exhibit 2; See also *Memo of the President of the IBRD*, *supra* note 22, at 67 (attached as Ex. 2 to Kazchrome Submission).

⁶⁰ *Tractebel: Part I-Enter Kyrgyz Electricity*, Economic News (April 5, 1999) (attached as Ex. 23 to Petitioners’ August 23 Letter).

⁶¹ See *Kazakhstan: Joint Private Sector Assessment*, *supra* note 5, at 7, attached as Exhibit 2.

⁶² See Petitioners’ July 30 Letter, *supra* note 4, at 27.

⁶³ See *id.* at 27, citing *Kazakhstan Country Report*, *supra* note 36, at 7 (attached as Ex. 28 to Petitioners’ August 23 Letter).

⁶⁴ *Id.* at 25, citing *The EU’s Relations with Kazakhstan-an overview*, The European Commission (attached as Ex. 35 to Petitioners’ August 23 Letter).

such as Kazakhstan, the concentration of power in an executive has allowed and reinforced tight central government control over economic resources, resulted in massive corruption and led to the creation of a “patrimonial” economic system in which economic actors look to the state for patronage and protection, all of which are fundamentally inconsistent with functioning markets:

In the context of privatization, the concentration of power in an executive who usually operates in the absence of checks and balances has created systems in which economic power is derived from the political patronage of the executive branch. This, in turn, has helped to reinforce and expand the power of the presidency. It also has fueled massive corruption at the highest reaches of the state and has created significant temptations for cronyism and nepotism (characteristics that are pronounced in Azerbaijan, Kazakhstan, the Kyrgyz Republic, Turkmenistan, Ukraine, and Uzbekistan).⁶⁵

The result has been the emergence of a dramatically different economic system in the former republics of the Soviet Union (outside of the Baltics), in which “private” enterprise is associated with economic elites intimately connected with the state:

The countries of the former USSR differ significantly in the nature of their economic transitions. Apart from high levels of corruption, those countries that have undertaken privatization have seen the emergence of powerful oligarchic economic elites. In the most authoritarian countries,⁶⁶ the oligarchs are usually intimately linked to the president and his inner circle. Many in the new powerful economic elite often derive their wealth from a patrimonial patronage system. And many come from the extended families and networks of cronies and friends of the chief executive. In Turkmenistan, Kazakhstan, the Kyrgyz Republic, Ukraine, Uzbekistan, and Azerbaijan, cronyism and nepotism are major features of the division of economic power.

. . . .

⁶⁵ Karatnycky, *supra* note 3, at 20, attached as Exhibit 1.

⁶⁶ Freedom House classifies Kazakhstan as a “Least Advanced (Despotic State)”. Motyl, *supra* note 10, at 38, attached as Exhibit 1.

In many cases {in the former Soviet republics}, the economic success of larger and growing business was linked to substantial payments to corrupt and covert partnerships with the ruling state elite. This legacy of illegality makes business interests highly susceptible to political and economic blackmail that compels loyalty to the regime.

....

Such state blackmail often forces economic actors to support leaders and policies that are inimical to the interests of fundamental reform and long-term economic growth. It also means that economic actors become rent seekers who rely on government favoritism to maintain privileged and noncompetitive positions in the economic system.⁶⁷

While corruption is a feature of all post-Communist states, the “degree of corruption from the highest levels to the lowest levels of the state structure is appalling in the states of the former USSR.”⁶⁸ Furthermore,

*This system of corruption is directly related to the nature of the economic system. In most of these countries, success in economic life derives from one’s access to patrons and protectors within the state. In most cases, such protectors collect a handsome reward for facilitating business interests. In many cases, they exercise effective control over nominally independent business and commercial structures.*⁶⁹

In such patrimonial economies,

the success of economic actors from the private sector is dependent on the good will and support of government structures to succeed. Moreover, a plethora of corrupt regulatory and inspection structures make the private sector beholden to state actors from the highest to the lowest levels. *This means that the state can*

⁶⁷ Karatnycky, *supra* note 3, at 20, attached as Exhibit 1.

⁶⁸ *Id.*

⁶⁹ *Id.* (emphasis added).

*substantially influence the actions of private economic actors in civic and political spheres and at local and national levels.*⁷⁰

Consistent with all of these statements, Freedom House notes that the least advanced countries of the former Soviet Union, including Kazakhstan, have generally developed highly personalized dictatorships (including that of president Nazarbayev) “*resting on administrative control of much, if not all, of the economy.*”⁷¹ Since 1995, the Nazarbaev regime “has acquired extensive control over most strategic resources and distribution networks.”⁷² Freedom House also notes the “concentration of political and economic resources within the first family” in Kazakhstan.⁷³ Ermukhan Ertysbaev, a pro-regime ideologue and the head of Kazakhstan’s Strategic Studies Institute, has acknowledged that “*business and power constitute a single monolith in Kazakhstan*, whose unconditional leader is Nursultan Nazarbaev”⁷⁴

The economic elites that have acquired “private” enterprise in Kazakhstan frequently are directly tied to the Nazarbayev regime. An analysis of the political elite in Kazakhstan in 1999 by the Institute of Contemporary Political Problems in Moscow identified seven major business groups that are headed by prominent political figures.⁷⁵ The institute detailed close business connections between these groups and the presidential family.⁷⁶ Kazchrome itself provides a telling illustration of these facts. In Kazakhstan,

all pro-regime {political} parties pledge allegiance to the president, who serves as their ultimate patron and benefactor. Among the prominent pro-regime parties currently represented in parliament are Otan, the Civil Party (Grazhdanskaia Partiia), and the Agrarian party.

. . . .

⁷⁰ *Id.* at 21-22 (emphasis added).

⁷¹ Motyl, *supra* note 10, at 38 (emphasis added), attached as Exhibit 1.

⁷² *Kazakhstan Country Report*, *supra* note 11, at 209, attached as Exhibit 1.

⁷³ *Id.*

⁷⁴ *Id.* at 217 (emphasis added).

⁷⁵ *See Kazakhstan Country Report*, *supra* note 11, at 216, attached as Exhibit 1.

⁷⁶ *See id.*

The Civil Party, which gained the second highest number of seats, represents powerful industrial interests. It is supported by the Eurasia group and headed by Aleksandr Mashkevich, a leading metallurgist and the founder of the Eurasian Bank in Kazakhstan. . . . The Eurasia group is estimated to produce almost one quarter of the country's GDP. Among its other key members are the leaders of six major metallurgical enterprises in Kazakhstan. Though the Civil Party has periodically contested the authority of Otan, it has pursued a clear pro-presidential agenda.

. . . .

In June 2000, both houses of parliament unanimously approved a bill on the "first president of Kazakhstan," which was introduced by the pro-presidential Civil Party. The new law confers lifelong powers and privileges on the 'first president'⁷⁷

Mashkevich, the head of the Civil Party, is one of the three Kazakh individuals that together own a large percentage of the shares in Kazchrome (which is part of the Eurasia group).⁷⁸ Thus, 25 percentage points of the nominally "private" sector share of GDP in Kazakhstan is produced by an industrial group that is politically connected with the Nazarbayev regime and helps perpetuate that regime. The state of political and economic affairs in Kazakhstan is perhaps best summarized by the following statement in *Nations in Transit 2001*: "{t}he post-Soviet transition in Kazakhstan -- at least its first decade -- has culminated in the consolidation of authoritarianism through patronage networks."

⁷⁷ *Kazakhstan Country Report*, *supra* note 11, at 211-12, attached as Exhibit 1.

⁷⁸ See Letter from Verner, Liipfert, Bernhard, McPherson & Hand, Chartered, Counsel for Petitioners, to the Honorable Donald L. Evans, Secretary of Commerce (July 18, 2001); *see also Charges Continue to Fly For Control of Kazchrome*, Ryan's Notes (January 19, 1998) (attached as Ex. 27 to Petitioners' August 23 Letter). As noted in Petitioners' prior submissions, Mashkevich and the other two Kazakh individuals were participants in a French company's winning bids to operate energy projects in Kazakhstan. Those deals are being investigated by French and Swiss authorities because the former chief executive of the French company acknowledged that he had authorized payments of \$55 million to these Kazakh individuals as commissions to win investment projects. See *Brussels Justice Accuses Ex-Partners of Tractebel in Kazakhstan (Justice: Soupconnes De Blanchment)*, L'Echo (June 15, 2001) (attached as Ex. 6 to Petitioners' August 23 Letter); *Generating Much Heat But No Kazakh Profits*, New York Times (May 13, 2001) (attached as Ex. 11 to Petitioners' August 23 Letter).

The existence of corruption in Kazakhstan is undisputed.⁷⁹ Kazchrome's argument that this corruption is irrelevant is at odds with the West's growing realization of the scope of the problem in the former Soviet sphere and its implications. In a chapter of this year's *Nations in Transit* report entitled "Thieves in Power," Freedom House notes that "a sophisticated level of collusion between 'big money' and 'big government' is common to all the countries in the old Soviet sphere of influence."⁸⁰ Freedom House notes the "depressing list of elected officials across the former Soviet sphere who have exploited their power for private profit,"⁸¹ including president Nazarbayev.⁸² The ability of these authoritarian governments "to institutionalize corruption has represented a new challenge, seriously complicating existing problems of governance"⁸³ And Western governments and institutions "are only just coming to the realization of their own unwitting complicity in the rise of the 'thieves-in-power.'"⁸⁴

⁷⁹ See Petitioners' July 30 Letter at 17-19; *see also Kazakhstan Country Report*, *supra* note 11, at 216, attached as Exhibit 1 ("it is generally agreed that a high degree of corruption emanates from the top."); *see also id.* ("{r}eferences to the concentration of wealth with the Nazarbaev family and its close associates have proliferated internationally. On March 3, 1998, *The Guardian* listed Nazarbaev among the eight richest people in the world. The June 1996 issue of the *Financial Times* included Nazarbaev among the 25 richest people.").

⁸⁰ Stephen Handelman, *Thieves in Power: The New Challenge of Corruption*, in *NATIONS IN TRANSIT* 2001 46-47 (Freedom House 2001), attached as Exhibit 1.

⁸¹ *Id.*⁸¹ *See Kazakhstan Country Report*, *supra* note 11, at 216, attached as Exhibit 1.

⁸² *See Kazakhstan Country Report*, *supra* note 11, at 216, attached as Exhibit 1.

⁸³ Handelman, *supra* note 80, at 46-47, attached as Exhibit 1.

⁸⁴ *Id.* at 53. A World Bank Report published in September 2000 concluded that "corruption in the region is developing new dimensions," and in October 2000 the EBRD "announced tight conditions for lending to Russia in the hope of halting pervasive corruption." *See id.* It is unfortunate but true that the early hopes among many Western institutions for the development of market-based economic systems and democratic governments in Kazakhstan and other former Soviet republics proved overly optimistic. The EBRD (which is the source of several of the reports cited by Kazchrome and Petitioners) was launched ten years ago amidst "grand claims to transform entire economies" -- claims that have now been replaced by "limited promises to clean up management practices in its designated areas of interest in eastern and central Europe." *Why The Marble Remains Tarnished*, *Euromoney* (April 2001), attached as Exhibit 4. Noting the difficulty of making any money on investments in Kazakhstan, Russia and Ukraine, one EBRD banker frankly acknowledged not long ago that "issues of transparency, governance, civil society and a lack of checks and balances are uppermost" in these countries. The banker noted: "It boils down to the question: who is making the decisions? How clean are these guys? And whether

For a country to operate according to market principles of cost and pricing structures, there must be independent economic actors competing with each other on the basis of price, service, quality and other market considerations. State regulation is fine, but to have a market outcome, the state must be neutral. Where the economic actors that succeed are selected by and enjoy the favoritism of a highly personalized and dictatorial state that has its own hands in the till, there is no real competition and no market outcome. It is like a rigged sporting event, in which the referee was paid off and the outcome was preordained. As Freedom House recognizes, “it is impossible to separate corruption from other categories measuring the social, economic, and political health of the transitional economies.”⁸⁵ Among other things, “{t}he prevalence of corruption has made it difficult, if not impossible, for ordinary entrepreneurs to respond to the opportunities of the free market.”⁸⁶ Governmental transparency and accountability also are critical to functioning markets. Jean Lemierre, the new president of the EBRD, recently emphasized this fact in an interview: “{w}e say: disclose your schemes, explain who you are. . . . Free press, open markets and democracy all work on transparency.”⁸⁷

The authoritarian and centralized nature of political power in Kazakhstan also has had an important negative impact on foreign investment, which is undeniably relevant under the statute. Freedom House states:

High-level corruption, the presence of powerful and competing economic interests within the regime, and the lack of accountability and a legal framework impeded Kazakhstan’s efforts to attract significant foreign investment in 1999 despite an ongoing economic recovery. Nazarbaev’s call for foreign investors to contact him directly when they encountered bureaucratic obstacles has curious ramifications. First, it indicates a desperate effort to invite investment. Second, it aims to supersede the authority of officials and agencies that are officially in charge of investment. Finally, it confirms the widely held view that the presidential family is closely involved in all major foreign investment deals.⁸⁸

you take the risks.” *Id.*

⁸⁵ Handelman, *supra* note 80, at 52, attached as Exhibit 1.

⁸⁶ *Id.*

⁸⁷ *Why the Marble Remains Tarnished*, *supra* note 84, attached as Exhibit 4. In the same interview, Lemierre noted that Ukraine (a country ranked above Kazakhstan by Freedom House) “needs a lot of work before it becomes a genuine, normal market economy.” *Id.*

⁸⁸ *Kazakhstan Country Report*, *supra* note 11, at 216, attached as Exhibit 1.

While foreign direct investment (“FDI”) in Kazakhstan reached \$2.1 billion in 1997, it plummeted to \$1.2 billion in 1998.⁸⁹ FDI in Kazakhstan “reached an all-time low when it fell to \$960 million in 1999, and it is expected to be even lower in 2000. The lion’s share of FDI is accrued from Tengizchevroil, OKIOC, {both in the energy sector} and Ispat International.”⁹⁰

III. Kazakhstan Does Not Operate On Market Principles Of Cost And Pricing Structures And Therefore Does Not Qualify As A Market-Economy Under The Law

In arguing that the reforms made by Kazakhstan to date warrant awarding it market-economy status, Kazchrome essentially is arguing that significant “market-based” reform is sufficient to satisfy the statutory standard (notwithstanding the recent backsliding and slowdown in reform in Kazakhstan). The question under the statute is not whether there has been significant progress, but rather whether the record shows that Kazakhstan operates on market principles of cost or pricing structures.⁹¹ In declining to revoke the NME status of Russia, the Department noted that Russia was “in the process of implementing extensive reforms to achieve its goal of becoming a market economy,” including the “freeing of most prices in December 1991 and the privatization of most enterprises formerly within the state-planning system.”⁹² The Department stated that:

We cannot conclude, however, based on the information in this record that Russia should be treated as a market economy for purposes of the antidumping duty law. The Russian economy, having emerged from a centrally-planned system, is in a state of transition. Many of the state controls have been abandoned, but that does not mean that functioning markets have replaced controls. Because the evidence does not demonstrate that prices and costs in

⁸⁹ *See id.* at 218.

⁹⁰ *Id.* The EBRD also stated in a document submitted by Kazchrome that “{d}espite significant potential in areas such as mining, Kazakhstan has attracted little foreign investment outside of the oil and gas sectors, owing to non-transparent side deals, insecurity of property and contract rights, and unfavourable tax and regulatory regimes.” Kazchrome June 28 Letter, *supra* note 3, at Exhibit 12.

⁹¹ Section 771(18)(A) of the Tariff Act of 1930 (the “Act”); 19 U.S.C. § 1677(18)(A) (2001).

⁹² *Notice of Final Determinations of Sales at Less Than Fair Value: Pure Magnesium and Alloy Magnesium From the Russian Federation*, 60 Fed. Reg. 16,440, 16,443 (March 30, 1995) (“*Magnesium from Russia*”).

Russia adequately reflect market considerations, we cannot at this time alter Russia's designation as a nonmarket economy.⁹³

Thus, the Department has recognized that the issue under the statute and its practice is not whether substantial reform has occurred but rather whether functioning markets are in place and prices and costs adequately reflect market considerations.⁹⁴ For all of the reasons set forth in Petitioners' July 30 letter and in this letter, there is no basis for such a conclusion with respect to Kazakhstan. The state sector remains very large and dominates key parts of the economy. Mainly because of the patrimonial and undemocratic system in that country, the state exercises a very high level of influence and de facto control over price and output decisions and resource allocation. These facts alone warrant finding that Kazakhstan did not operate according to market principles of cost and pricing structures during the POI.

Furthermore, in advancing its "significant progress" standard, Kazchrome would have the Department ignore undisputed record evidence set forth in Petitioners' July 30 letter showing that the prices of key goods and services are not market-determined in Kazakhstan. The state regulates the prices of a very large number of enterprises and holds regulated prices for important commodities, including electricity and transportation,⁹⁵ at below cost-recovery levels.⁹⁶

⁹³ *Id.* See also *Notice of Final Determination of Sales at Less Than Fair Value: Certain Cut-to-Length Carbon Steel Plate From Ukraine*, 62 Fed. Reg. 61,754, 61,756 (November 19, 1997) ("Carbon Steel Plate from Ukraine") ("While significant progress has been made in Ukraine's transformation to a market economy, under the analysis required by section 771(18)(B) of the Act, we cannot conclude that Ukraine should be treated as a market economy for purposes of the antidumping duty law. While many of the state controls have been abandoned, functioning markets have not completely replaced government controls.").

⁹⁴ In applying the correct legal standard, the Department also should bear in mind the remedial purpose of the antidumping statute. The purpose of the antidumping statute is to protect domestic industries and workers (and their communities) from material injury due to unfairly priced imports, including imports whose prices are affected by NME distortions. The purpose of the statute is not to reward a country for steps that might be viewed as "positive" or to "graduate" a country based on some kind of "preponderance" or part-way level of reform.

⁹⁵ Rail transportation is an important factor in silicomanganese production and the production of other metals and industrial products in Kazakhstan. The mineral inputs used to produce such products are bulky commodities frequently shipped significant distances. Kazakhstan is also a very large country, increasing the importance of rail transportation.

⁹⁶ See Petitioners' July 30 Letter, *supra* note 4, at 9, citing *Economic Reforms in Kazakhstan, Kyrgyz Republic, Tajikistan, Turkmenistan, and Uzbekistan*, Occasional Paper 183 at 57-58, International Monetary Fund (1999) (attached as Ex. 27 to Petitioners' August 23 Letter).

In addition, Kazakhstan is a mineral-rich country and significant portions of its industrial output draw upon those resources. The GOK licenses mineral resources, and many companies acquired licenses under closed and nontransparent conditions.⁹⁷ As explained above, ultimate control of Kazakhstan's extensive mineral and energy resource base is in the hands of president Nursultan Nazarbayev and economic elites connected with the regime.⁹⁸ In addition, production of many of the products made in the large industrial enterprises in Kazakhstan, like Kazchrome, is highly capital intensive.⁹⁹ The more than 300 very large wholly state-owned enterprises in Kazakhstan were built by the state. Their overhead costs are not market-determined. With respect to privatized enterprises, government tenders for state property have not been conducted in an open manner than ensures competition and market pricing.¹⁰⁰ In these circumstances, the Department can have little to no confidence that even "privatized" enterprises' overhead costs adequately reflect market considerations.¹⁰¹

In order for the Department to apply its market-economy dumping methodologies, prices and costs must be market-determined in the economy in question. The economic environment must be one of functioning markets, in which any isolated distortions caused by government interference can be reliably and practicably quantified in the context of a

⁹⁷ See *id.* at 6-7, citing *Economic Transition in Central and Eastern Europe, Baltic States and the CIS*, *supra* note 22, at 175 (Table 2.1) (attached as Ex. 12 to Kazchrome Submission).

⁹⁸ See *Kazakhstan Country Report*, *supra* note 10, at 209, attached as Exhibit 1.

⁹⁹ See Petitioners' August 14 Letter, *supra* note 36, at 9.

¹⁰⁰ See Petitioners' July 30 Letter, *supra* note 4, at 17 to 19, citing *2000 Country Commercial Guide: Kazakhstan*, prepared by U.S. Embassy Almaty, U.S. Department of State, at 39 and 53 (July 1999); *Economic Transition in Central and Eastern Europe, Baltic States and the CIS*, *supra* note 22, at 175 (Table 2.1) (attached as Ex. 12 to Kazchrome Submission); *Ex-Kazakhstan Premier Says US firms' Oil Fees Diverted to Ministers*, AFX News Limited (July 18, 2001) (attached as Ex. 1 to Petitioners' August 23 Letter); *Kazakhstan Country Report*, The Economist Intelligence Unit, at 13 (October 2000) (attached as Ex. 31 to Petitioners' August 23 Letter); *Generating Much Heat But No Kazakh Profits*, *supra* note 78 (attached as Ex. 11 to Petitioners' August 23 Letter); *Brussels Justice Accuses Ex-Partners of Tractebel in Kazakhstan (Justice: Soupconnes De Blanchimen)*, *supra* note 78 (attached as Ex. 6 to Petitioners' August 23 Letter).

¹⁰¹ Kazchrome reported purchasing coke and electrode paste from Russia and stated that "Kazakhstan is surrounded by countries that are considered to be non-market economy countries by the Department of Commerce. Accordingly, all logical suppliers in reasonable proximity to the Aksu Plant are located in these non-market economy countries." Kazchrome Sections C and D Questionnaire Response at D-7 (July 19, 2001). The same is true for many other enterprises in Kazakhstan.

countervailing duty analysis. If there are core sectors of the economy or key inputs for which prices and costs are not market-determined, the Department can neither apply market-economy dumping margin calculation methodologies nor perform a countervailing duty analysis without encountering a large number of distortions at multiple levels of the economy, which would render such analyses invalid. Awarding market-economy status to a country like Kazakhstan (which is ranked lower than Russia and Ukraine by *Nations In Transit 2001*) in which the state owns a very large portion of and is deeply involved in the economy by numerous means would create an enormous administrative burden -- indeed, a fundamentally impossible task -- for the Department in investigating the countervailing duty petitions that undoubtedly would be filed if the country were awarded market-economy status.

Furthermore, as explained below, contrary to arguments advanced by Kazchrome in its August 14 letter, the facts with respect to banking, labor and price liberalization in Kazakhstan do not support a conclusion that Kazakhstan meets the statutory standard for a market-economy country.

A. The State And Elites Connected To The State Control Major Parts Of The Banking Sector

In its August 14 letter, Kazchrome argues that “the strength of progress and reform in Kazakhstan’s banking sector has significantly increased the extent to which capital is allocated according to market forces.”¹⁰² Specifically, according to Kazchrome, the “reform-minded policies of the National Bank of Kazakhstan (NBK) have led to consolidation and privatization within the banking sector”¹⁰³ Kazchrome notes that the number of banks has been reduced from 200 in 1993 to 48 at the beginning of 2001.¹⁰⁴

However, the “flip side of {this} consolidation is that the *major banks are controlled by members of the Nazarbaev family* and by major business interests,”¹⁰⁵ which, as noted above, frequently are connected to the regime. Furthermore, a very large portion of the assets of the banking system in Kazakhstan is still directly controlled by the state. The World Bank (in the document Kazchrome cited but did not submit for the record) stated that

¹⁰² Kazchrome August 14 Letter, *supra* note 1, at 16.

¹⁰³ *Id.*

¹⁰⁴ *See id.*

¹⁰⁵ *Kazakhstan Country Report*, *supra* note 11, at 218 (emphasis added), attached as Exhibit 1.

{t}he banking system is characterized by concentrated ownership and concentrated lending. With regard to concentrated ownership, as of end-January 1998, two banks (one state owned and the other private) accounted for more than 50 percent of assets and deposits. *State owned banks accounted for about 40 percent of total banking assets.*¹⁰⁶

And as noted in Petitioners' July 30 letter, the GOK also has prioritized and financed specific business activities through loan guarantees that the World Bank has identified as a source of "significant indirect influence" in the Kazakh economy that "distort{s} economy-wide resource allocation."¹⁰⁷ These facts do not support a conclusion that the price of capital and borrowing rates are largely market-determined in Kazakhstan. Rather, they show the opposite.

B. Wages Are Not Market-Determined

In its August 14 letter, Kazchrome asserts that "the continued existence of government-sponsored unions has not suppressed Kazakh workers or disallowed free bargaining between labor and management."¹⁰⁸ First, the state unions do not just "continue to exist." They dominate, even if some embryonic resistance to those unions is beginning to form because they do not serve workers' interests:

The closure of industrial enterprises and mining sites because of inadequate financing and equipment has caused a rapid deterioration in the socio-economic conditions of industrial workers. Industrial unrest has been on the rise, and independent worker's unions have challenged the dominant status of the state-sponsored Association of Trade Unions. This union is a successor to the Soviet-era General Council of Trade Unions and, with a declared membership of four million, remains the largest organization of its kind in the country. The Confederation of Independent Trade Unions, which receives support from the Human Rights Bureau and many other nonprofit groups, has

¹⁰⁶ Kazakhstan: Joint Private Sector Assessment, *supra* note 5, at 8 (emphasis added), attached as Exhibit 2.

¹⁰⁷ See Petitioners' July 30 Letter, *supra* note 4, at 12, citing *Kazakhstan Public Expenditure Review*, *supra* note 29, at Vol. I at xiii (attached as Ex. 1 to GOK Submission).

¹⁰⁸ Kazchrome August 14 Letter, *supra* note 1, at 8.

expanded its grassroots organizations across the country and claims 250,000 members.¹⁰⁹

Second, there is extensive record evidence -- none of it disputed by Kazchrome -- consisting of statements by objective observers (such as the U.S. State Department) that independent unions in fact are harshly and actively suppressed by the government and by enterprises (with government support).¹¹⁰

Kazchrome also argues that reported “instances of unions successfully negotiating collective bargaining agreements,”¹¹¹ reports of some strikes occurring and statistics purporting to show improving economic conditions for workers (*i.e.*, rising wages) establish that “market forces are now at work in the Kazakh labor market.”¹¹² First of all, the issue is not whether “market forces” are “at work” in some limited sense. The issue also is not whether worker conditions are improving (which the above-quoted statement regarding deteriorating conditions contradicts).¹¹³ The question is whether labor rates were largely market-determined in

¹⁰⁹ *Kazakhstan Country Report*, *supra* note 11, at 213, attached as Exhibit 1 (this new Freedom House country report also states that “{w}orkers are coerced routinely to join the state-sponsored trade union. Their jobs are threatened if they associate with independent trade unions or NGOs that champion their rights.”) *See also* Petitioners’ July 30 Letter, *supra* note 4, at 23, citing FREEDOM HOUSE, *supra* note 29, at 331 (attached as Ex. 8 to Kazchrome Submission); *see also Kazakhstan, Country Reports on Human Rights Practices-2000*, at Section 6, U.S. Department of State (February 2001) (attached as Ex. 33 to Petitioners’ August 23 Letter).

¹¹⁰ *See id.* at 23, citing *Kazakhstan, Country Reports on Human Rights Practices-2000*, *supra* note 109, at Section 6 (attached as Ex. 33 to Petitioners’ August 23 Letter). In its August 14 letter, Kazchrome asserts that “the labor situation at the Aksu ferroalloy plant is a telling case in point. Independent unions are active at the Aksu Plant and laborers are free to bargain collectively.” Kazchrome August 14 Letter, *supra* note 1, at 8. These statements: (1) do not state that collective bargaining through independent unions occurs at the Aksu plant; and (2) do not state that any (or any significant number) of Kazchrome workers are actually members of independent rather than state-controlled unions.

¹¹¹ This statement does not indicate whether the collective bargaining occurred through independent unions.

¹¹² Kazchrome August 14 Letter, *supra* note 1, at 7.

¹¹³ In addition, Kazchrome’s argument is undercut by the fact that even if wages are rising, they are not being paid in many cases. *See Kazakhstan, Country Reports on Human Rights Practices-2000*, *supra* note 109, at 23 (attached as Ex. 33 to Petitioners’ August 23 Letter) (“{w}orkers continue to protest chronic nonpayment of wages.”).

Kazakhstan during the POI. The fact that workers are beginning to challenge the “dominant status” of the state-controlled unions (despite suppression by the GOK) does not mean that there is now a functioning labor market in Kazakhstan, particularly when there are so many reports of workers’ rights being impeded.¹¹⁴

A functioning market for labor presumes that workers (the sellers of labor) are able to bargain effectively with employers (the purchasers). Where, as in Kazakhstan, the state is not neutral and impedes the ability of one side (the sellers of labor) to bargain effectively through independent unions that are free of state control, the necessary predicates for a functioning labor market do not exist. In addition, the high level of state ownership of large enterprises (including in core sectors of the Kazakh economy) has the result that “powerful state-owned industries control many wages and prices.”¹¹⁵

C. The Mere Dismantlement Of The Old Soviet System Does Mean That Functioning Markets Are In Place In Kazakhstan, Particularly Since The State Sector Remains Very Large and Dominant

In arguing that Kazakhstan qualifies as a market-economy, Kazchrome does not cite any evidence showing that functioning markets exist in Kazakhstan. Rather, it relies on the fact that the old Soviet system of price regulation has been dismantled, *i.e.*, that prices have been liberalized (with exceptions).¹¹⁶ First of all, as noted above, there remain “over eleven hundred companies” which are considered to be natural monopolies in Kazakhstan and are under the

¹¹⁴ See Petitioners’ July 30 Letter, *supra* note 4, at 22-24. In its August 14 letter, Kazchrome also argues that “Petitioners have not demonstrated that the GOK, in fact, intervenes in the negotiation of wages in any manner in Kazakhstan.” August 14 Letter, *supra* note 1, at 8, note 25. That is not Petitioners’ argument. Rather, Petitioners’ argument is that the GOK impedes free bargaining between workers and management, preventing the Department from finding a functional labor market in Kazakhstan. Second, it is not Petitioners’ burden to show that wages are *not market-determined* (as a result of GOK intervention). See *Magnesium from Russia*, *supra* note 92, at 61,756. Kazchrome and the GOK bear the burden of showing that functioning labor markets exist in Kazakhstan. They have not done so.

¹¹⁵ *Kazakhstan*, The 2001 Index of Economic Freedom, The Heritage Foundation (emphasis added) (attached as Ex. 32 to Petitioners’ August 23 Letter).

¹¹⁶ See Kazchrome August 14 Letter, *supra* note 1, at 15. *Kazakhstan Public Expenditure Review*, *supra* note 29, at Vol. II, Ch. 1 (citing the World Bank’s statements regarding the “liberalization of the economy (freeing most prices, interest rates, and exchange rates)”; FREEDOM HOUSE, *supra* note 29, at 331 (attached as Ex. 8 to Kazchrome Submission) (“prices are almost completely liberalized”).

supervision of the state Antimonopoly Committee,”¹¹⁷ which is known for holding regulated prices below full cost.¹¹⁸ In addition, the World Bank (in the document Kazchrome cited but did not submit for the record) stated that “{m}embers of the {Antimonopoly} Committee admit that the prices set for natural monopolies are often influenced by political forces and by senior officials in the government.”¹¹⁹

Moreover, as noted above, the Department has recognized that price liberalization alone does not establish that functioning markets are place. In declining to grant market-economy status to Russia, the Department recognized that reforms in that country included the “freeing of most prices in December 1991.”¹²⁰ Nevertheless, the Department stated: “{m}any of

¹¹⁷ *Tractebel: Part I – Enter Kyrgyz Electricity*, *supra* note 60 (attached as Ex. 23 to Petitioners’ August 23 Letter). In its August 14 letter, Kazchrome argues that price regulation makes economic sense where “technical efficiency requires that a single firm produce the product.” Kazchrome August 14 Letter, *supra* note 1, at 17. However, the GOK’s idea of a “natural monopoly” does not appear to be limited to such instances. For example, while a local electricity distribution company could be such a monopoly, a power plant connected to the electricity grid is not. There is no technical necessity that one plant produce all the electricity in Kazakhstan; and there is not one such plant. Yet a U.S. company, AES, has been unable to generate any profits from its investment in a coal-fired power plant because of Kazakh regulators’ refusals to permit AES to raise rates to cover its costs. *See Generating Much Heat But No Kazakh Profits*, *supra* note 78 (attached as Ex. 11 to Petitioners’ August 23 Letter). There is no record evidence showing that all of the *over 1,100 companies* subject to price regulation in Kazakhstan are really “natural monopolies.” In its August 14 letter, Kazchrome also argues that “Kazakhstan’s decreasing regulation of its natural monopolies is in line with what the Department has observed in other new market economies.” Kazchrome August 14 Letter, *supra* note 1, at 18. However, in its letter, Kazchrome does not identify any record evidence indicating that “natural monopoly” regulation in Kazakhstan is decreasing.

¹¹⁸ *See Kazakhstan Investment Profile*, *supra* note 26, at 21 (attached as Ex. 4 to GOK Submission); *Generating Much Heat But No Kazakh Profits*, *supra* note 78 (attached as Ex. 11 to Petitioners’ August 23 Letter).

¹¹⁹ *Kazakhstan: Joint Private Sector Assessment*, *supra* note 5, at 7, attached as Exhibit 2. The World Bank stated that “{p}rivatization of these natural monopoly sectors requires that a professional and independent regulatory commission be in place.” *Id.*

¹²⁰ *Magnesium from Russia*, *supra* note 97, at 16,443; *see also Carbon Steel Plate from Ukraine*, *supra* note 93, at 61,756.

the state controls have been abandoned, but that does not mean that functioning markets have replaced controls.”¹²¹

Most importantly, notwithstanding the privatization that has occurred in Kazakhstan, the state remains the sole or majority owner of a very significant number of enterprises -- in core sectors of the economy -- including more than 300 very large wholly state-owned enterprises that account for about a third of GDP, plus over 5,000 medium- and 1,000 large-sized majority state-owned enterprises.¹²² Prices of these enterprises are not free of state control. Nor are the 2,000 minority state-owned enterprises entirely free of such control. The World Bank has said that these enterprises complain that the state continues to block decisions using its position on the board.¹²³

In its August 14 letter, Kazchrome asserts that Petitioners “overstate” the economic impact of the wholly state-owned and majority state-owned enterprises in Kazakhstan.¹²⁴ Nothing could be farther from the truth. Directly contradicting Kazchrome’s assertion, the World Bank has stated (in the document Kazchrome cited but did not provide for the record):

Though Kazakhstan has privatized thousands of enterprises, many large important enterprises remain in majority state ownership. Though few in number, these large and very large enterprises *dominate the economy*. The State is still the only owner of 333 of these enterprises, and they account for about a third of GDP. Many of these large and very large enterprises have been transferred by the State Property Committee to ‘trust management’ in which existing managers or the regional administrators have control over the enterprises. Regardless, these enterprises are still in state ownership, and trust management should not be a permanent

¹²¹ *Id.*

¹²² See Petitioners’ July 30 Letter, *supra* note 4, at 4, citing *Kazakhstan Investment Profile*, *supra* note 26, at 11 (attached as Ex. 4 to GOK Submission); see also *Memo of the President of the IBRD*, *supra* note 22, at 6 (attached as Ex. 2 to Kazchrome Submission); FREEDOM HOUSE, *supra* note 29, at 340 (attached as Ex. 8 to Kazchrome Submission).

¹²³ See *Memo of the President of the IBRD*, *supra* note 22, at 66 (attached as Ex. 2 to Kazchrome Submission).

¹²⁴ Kazchrome August 14 Letter, *supra* note 1, at 13.

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solution. *Substantial additional privatization is needed in Kazakhstan to create a truly private economy.*¹²⁵

VI. Conclusion

For the reasons set forth above and in Petitioners' July 30 letter, Kazakhstan does not satisfy the standard prescribed by law for obtaining market-economy status.

Very truly yours,

William D. Kramer
Clifford E. Stevens, Jr.
David S. Levy (Consultant)
Jessica A. Burdick
VERNER, LIIPFERT, BERNHARD,
McPHERSON AND HAND,
CHARTERED
901 - 15th Street, N.W.
Washington, D.C. 20005-2301

Counsel for Petitioners

cc: Joseph Spetrini
Jean Kemp
Brandon Farlander
Mark A. Barnett
George Smolik

¹²⁵ *Kazakhstan: Joint Private Sector Assessment*, *supra* note 5, at 4, attached as Exhibit 2 (emphasis added).

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing letter was served on the following party by hand delivery on this 29th day of August, 2001:

CarrieLyn D. Guymon
O'Melveny & Myers LLP
555 13th Street, N.W.
Washington, D.C. 20004-5414

Jessica A. Burdick